

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Petition for Rulemaking)

To Amend Eligibility requirements in Part 78)

Regarding 12 GHz Cable Television)

Relay Service)

CS Docket No. 99-250

RM - 9257

COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), hereby submits these comments regarding the above-referenced Notice of Proposed Rulemaking (the "NPRM").

INTRODUCTION AND BACKGROUND

This proceeding was initiated by OpTel's petition requesting that the Commission open the 12 GHz CARS band to private microwave licensees so that they may compete with franchised cable television operators in the delivery of video programming.¹ The fundamental principle underlying OpTel's petition was that, in an era in which the Commission is making every effort to foster competition to the incumbent franchised cable monopolists, the microwave eligibility rules should not favor those same monopolists.

OpTel is encouraged that the Commission now has released an NPRM seeking comment on rule changes that would allow non-franchised multichannel video programming distributors ("MVPDs") to use the 12 GHz CARS band. OpTel is distressed, however, that the basic principle in question seems not to be fully reflected in the NPRM. In particular, OpTel opposes any suggestion in the NPRM that non-franchised MVPDs should have access to the band only in limited circumstances, or that they should suffer conditions on their use of the band that do not apply to franchised cable operators.

Thus, for the reasons set forth below, OpTel urges the Commission to amend its rules to allow all MVPDs to use the 12 GHz CARS band on an equal footing with franchised cable operators.

¹ OpTel Petition For Rulemaking, RM-9257 (filed Apr. 1, 1998).

DISCUSSION

I. The Commission Should Allow All MVPDs To Use The 12 GHz Band For The Delivery Of Video Programming Material.

Under the current Part 78 rules, 12 GHz CARS stations can be licensed only to franchised cable operators, qualified cable networks, MDS and MMDS licensees, and ITFS operators.² Other MVPDs, including private cable operators, are not permitted to use the band. This eligibility restriction draws an artificial and arbitrary distinction between different classes of MVPDs.

To illustrate the arbitrary and, indeed, irrational nature of the eligibility restriction, OpTel is permitted to use the 12 GHz band in some of its markets by virtue of the fact that it holds a local cable franchise in those markets, but it is not permitted to use the band in other localities where it does not hold a local cable franchise — even though the systems involved are functionally identical. The restriction does not, therefore, have anything to do with the qualifications of the licensee or the nature of the service being provided.

The only difference between OpTel's private and franchised cable systems is that the franchised systems have been granted a license to use public rights-of-way for hardwired connections in the system. There is, however, no nexus between the granting of such a local license or franchise and one's qualifications to be a federal microwave licensee.

Of course, this is not simply a matter of the Commission's rules disadvantaging OpTel's private cable systems *vis-à-vis* its own franchised systems. The real competitive harm results from the disparate treatment of an entire class of MVPDs attempting to compete against franchised cable operators. The time has long-passed for the Commission to do away with such artificial and one-sided eligibility restrictions.

A. The 12 GHz Band Provides Superior Spectrum For Video Delivery.

OpTel currently uses 18 GHz (18.142-18.580 MHz) microwave distribution networks to deliver programming to its "private cable systems." Although there are other bands of spectrum above 21.2 GHz that private microwave licensees may use for this purpose, those bands have neither the technical characteristics nor the bandwidth required to provide a video service that is comparable to — and competitive with —

² See 47 C.F.R. § 78.13.

franchised cable service.³ For precisely that reason, the Commission, in 1991, opened the 18 GHz band (which already had been, and still is, available to franchised cable operators) for use by private cable systems. The Commission noted at that time that providing private cable systems with access to some of the microwave spectrum used by franchised cable operators would be a "significant step in furtherance of [its] effort to encourage more robust competition in the multichannel video delivery marketplace."⁴

The Commission was right. Since that time, there has been a vast expansion of high-end private cable services provided through advanced microwave networks. System operators have been able to combine 18 GHz paths with paths in other bands (e.g., 23 GHz) to deliver an integrated package of video, telephone and Internet access services to subscribers. Nonetheless, there continues to be a pressing need for new and better spectrum for the delivery of private cable and telecommunications services. The 12 GHz band can provide that spectrum.

To begin with, and contrary to the assumption in the NPRM, the useful range of a 12 GHz path is substantially greater than that of an 18 GHz path. In order to provide a clear, commercially viable signal using 18 GHz facilities, private cable systems normally will use no single link greater than 8 miles; and often systems are engineered to rely on shorter paths to ensure system performance.

By comparison, 12 GHz microwave facilities have an effective range of 12 miles or more; a 50% increase in the range of the station. This difference is significant in a market in which efficiency of distribution is such a large factor in the cost of operating a system. For a new entrant seeking to serve a large metropolitan area, a four mile increase in the radius of a microwave station can mean an increase of tens-of-thousands of potential new customers that can be served from a single hub.⁵

Second, recent and proposed FCC rule changes threaten to undermine the continued value of the 18 GHz band for video delivery. As the Commission notes in the NPRM, it has established permanent exclusion zones for microwave operations at 18 GHz in Denver and Washington, D.C.⁶ The NPRM attempts to minimize the

³ See 47 C.F.R. § 101.603.

⁴ In re Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, 6 FCC Rcd 1270 (1991).

⁵ Even using the figures cited in the NPRM at ¶ 18 & n.52, it is apparent that 12 GHz facilities have a range 3-4 miles greater than 18 GHz facilities, which represents approximately a 37% increase.

⁶ NPRM ¶ 19 (citing Amendment to the Commission's Rules to Relocate the Digital Electronic Message Service, 13 FCC Rcd 3581 (1998)).

importance of these exclusion zones by noting in passing that they are “limited in size.” The absolute size of the zones, however, is not terribly important — what is important is that they encompass the heart of metropolitan Denver and Washington. However large the suburbs of these cities outside of the exclusion zones, a private cable operator simply cannot compete if it cannot serve the urban center of a city.

In any event, the limits on 18 GHz use in Denver and Washington are but the tip of the iceberg. The Commission also has, as the NPRM acknowledges, proposed a redesignation of the 18 GHz band plan that would grant fixed-satellite service licensees a blanket license in a large section of the band now used by private cable systems.⁷ The Commission forthrightly concedes that, whatever the result of that proceeding, “the future use of the 18 GHz band by terrestrial services, such as [private cable operators], will be limited by increasing use by satellite systems.”⁸

The 12 GHz band suffers under none of the impediments that are threatening the 18 GHz band. Although the Commission notes that there is a proposal pending to permit NGSO gateway uplinks in the band, the Commission has tentatively concluded that NGSO gateway uplinks will be able to share the band with incumbent terrestrial operations.⁹ An amendment of Part 78 to permit other MVPDs to use the 12 GHz band for the delivery of video programming would not alter that conclusion. To the extent that NGSO systems are able to coordinate with franchised cable licensees, they also will be able to coordinate with other MVPDs using the band for video delivery.

Finally, because the 12 GHz band already is used by franchised cable operators for video distribution, there is equipment available off-the-shelf and the technical rules relating to operations in the band need not be modified to accommodate other MVPD licensees. Thus, the 12 GHz band is a natural expansion band for MVPDs seeking to compete with franchised cable operators.

B. There Is No Policy Justification For Favoring The Incumbent Franchised Cable Monopolists In The Commission's Microwave Eligibility Rules.

Most local video distribution markets remain highly concentrated. In the most recent FCC study, the Commission found that the HHI for this market is an astounding

⁷ See Redesignation of the 17.7-19.7 GHz Frequency Band, IB Docket No. 98-172 (rel. Sept. 18, 1998).

⁸ NPRM ¶ 21.

⁹ In re Amendments of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems, ET Docket No. 98-206 (rel. Nov. 24, 1998) ¶ 33.

7015.¹⁰ A market with an HHI of 1800 is regarded by the Department of Justice as highly concentrated. Yet, inexplicably, the CARS eligibility rules continue to prohibit some of those who would compete with cable from obtaining access to the 12 GHz band. Such discrimination no longer can be justified.

As the Commission noted when it amended Part 78 to permit wireless cable operators to use the CARS bands, the "use of the microwave spectrum should be governed by type of use rather than type of licensee."¹¹ In the case of wireless cable operators, the Commission concluded that because "cable and wireless cable have similar needs for CARS" frequencies, the Commission's rules should not favor the incumbent franchised operators.¹²

The same principles apply with respect to private cable systems and other MVPDs that compete with franchised cable operators, but which currently are not eligible for a CARS band license. In a regulatory environment in which the Commission is attempting to encourage competition, and to allow competitive forces to determine "winners and losers" in the market, there is no room for asymmetric microwave regulations that favor one group of competitors over another — particularly not regulations that favor the incumbent monopolists. As set forth above, the 12 GHz band provides a superior spectrum resource for the delivery of video programming material. All MVPDs, whatever their primary means of program distribution or system architecture, and regardless of whether they hold a local franchise, should have access to that resource.

On that basis, OpTel opposes suggestions in the NPRM that the Commission should adopt rules in this proceeding that favor one set of MVPDs or another. For example, the NPRM asks for comment on whether the rule changes proposed might "unduly constrain future growth of incumbent cable services."¹³ The Commission should not, however, be any more concerned about protecting the "future growth" of incumbent operators than it is about the "future growth" of competitors to the incumbents. And, in any event, as the Commission concluded in response to this same concern when it opened the 12 GHz band to wireless cable, "congestion is not a reason

¹⁰ See 1998 Video Competition Report, 14 C.R. 923, 971 (1998).

¹¹ Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing the Use of the Frequencies in the 2.1 and 2.5 GHz Bands, 5 FCC Rcd 6410, 6423 (1990).

¹² Id.

¹³ NPRM ¶ 5.

to exclude a particular segment of a group of similarly situated candidates from access to the spectrum."¹⁴

Similarly, access to 12 GHz spectrum should not turn on whether the licensee is required to provide service to an entire community.¹⁵ Indeed, as currently drafted, there is no such restriction in Part 78. Wireless cable systems, which normally have no duty to serve an entire community, are permitted to use 12 GHz frequencies, and franchised cable systems that have limited franchises (*i.e.*, which permit the operator to serve only part of a community) also are eligible for 12 GHz CARS band licenses. Indeed, a limited franchise authorizing an MVPD to hardwire a single public street to serve a single MDU would render the MVPD eligible for a CARS license. There simply is no connection between Part 78 eligibility and any obligation by the licensee to serve any particular portion of a community.

Finally, the NPRM also asks whether "other alternatives, such as 23 GHz, or use of fiber optic cable," obviate the need to provide non-franchised MVPDs with access to the 12 GHz band.¹⁶ Of course, franchised cable operators have access to all of those same "alternatives," but the Commission has not deemed that a reason to deny them access to the 12 GHz band. The fact is that franchised operators have available to them a mix of delivery technologies from which to choose depending on the market circumstances. MVPDs that compete with the franchised cable monopolists should be able to choose from among the same array of alternatives.

II. Non-Franchised MVPDs Should Not Suffer Under Discriminatory Service Rules In The 12 GHz Band.

In the NPRM, the Commission asks for comment on a number of questions regarding the service rules that should apply to non-franchised MVPDs in the 12 GHz band. For example, the NPRM asks:

► Whether non-franchised MVPDs should have to "exhaust their spectrum usage in the 18 GHz and 23 GHz frequency bands ... before being eligible to use the 12 GHz CARS band;"¹⁷

¹⁴ 5 FCC Rcd at 6423. Further, as a factual matter, OpTel has done a frequency sweep in several large cities and found the 12 GHz band to be lightly used. Apparently, most cable systems now use fiber-optics in urban areas. Nonetheless, to help ensure successful sharing in the band, the more rigorous prior coordination notification procedures used by Part 101 licensees, see 47 C.F.R. §§ 101.103, 101.105, should apply to all users in the band.

¹⁵ See NPRM ¶ 16.

¹⁶ Id. ¶ 21.

¹⁷ Id. ¶ 16.

- ▶ Whether private cable use of the 12 GHz band should be on a secondary basis;¹⁸
- ▶ Whether eligibility to use the 12 GHz band should be limited to private cable operators with some minimum number of subscribers;¹⁹
- ▶ Whether private cable operators seeking to use the 12 GHz band should be "required to demonstrate that they need to transmit over more than 10 miles."²⁰

These questions suggest that, if the Commission amends Part 78 to permit non-franchised MVPDs to use the 12 GHz band, it may impose unfair and uneven service rules upon them. There is no basis for doing so.

At bottom, the microwave eligibility rules should be competitively neutral. Franchised cable operators are not required, in order to obtain a license in the 12 GHz band, to demonstrate that they have exhausted alternative bands of spectrum or that the path for which they are applying is greater than 10 miles. Nor is there any minimum number of subscribers that a franchised operator must serve in order to be eligible for a 12 GHz license. There is, therefore, simply no justification for imposing these types of requirements on non-franchised MVPDs that are attempting to compete with franchised operators. The Commission recognized this principle when it extended CARS eligibility to wireless cable operators without added restrictions.²¹

Indeed, the very notion that the FCC would add burdens to cable competitors that do not apply to franchised cable operators runs contrary to the Commission's stated objective of increasing MVPD competition. The only rationale offered by the Commission in the NPRM for the uneven treatment of non-franchised MVPDs is reflected in the question of whether non-franchised MVPDs should be secondary to franchised cable in the band — the Commission appears to believe that new entrants in the MVPD market should not "interfere with cable systems or MMDS licensees that have actual plans for use of a CARS station."²²

That rationale is unsupportable in a competitive environment — the Commission should not be in the business of protecting any one class of competitors to the

¹⁸ *Id.* ¶¶ 16, 21.

¹⁹ *Id.*

²⁰ *Id.* ¶ 18.

²¹ 5 FCC Rcd at 6423 ("Although several cable interests urge us to restrict the use of CARS frequencies by wireless cable operators in a variety of ways, they offer no basis for the disparate treatment they propose.").

²² NPRM ¶ 16.

disadvantage of another. If a 12 GHz path is being used by an MVPD to provide service to subscribers, other MVPDs (yes, even franchised cable operators) that otherwise might use the path will have to plan accordingly; they may be required to use some alternative spectrum band, a different path to the destination point, or some hardwired delivery technology. MVPDs such as OpTel do this on a regular basis in the 18 GHz band; it can be done in the 12 GHz band. The days of protecting franchised cable operators from the harsh realities of competition should be over.

The Commission also should understand that "secondary" status for a private cable system is effectively no status. No rational operator — or investor — would invest in 12 GHz microwave facilities and contract to provide services to subscribers using those facilities if, at any time and without warning, the operator may be required to shut down the facilities because they are causing interference to a system operated by one of its competitors. Indeed, if private cable operators are made secondary in the band, and assuming that some operator makes the mistake of actually building a system based on 12 GHz distribution, the local franchised cable operator would have the perverse incentive to design its own microwave system so as to maximize inter-system interference either to cause its competitor to shut down, or at least to degrade the private cable operator's signal.

III. 12 GHz Licenses Should Not Be Subject To Competitive Bidding.

In the NPRM, the Commission asks whether 12 GHz band licenses should be awarded by competitive bidding. They should not.

The Communications Act authorizes the Commission to award licenses by competitive bidding only in those instances in which mutually exclusive applications are received for filing.²³ The Commission must first, however, make every reasonable effort to avoid mutual exclusivity.²⁴ Recently, several members of Congress reiterated their concern that the Commission avoid mutual exclusivity whenever possible rather than resort to license auctions.²⁵

²³ 47 U.S.C. § 309(j)(1).

²⁴ 47 U.S.C. § 309(j)(6)(E) ("Nothing in this subsection, or in the use of competitive bidding, shall be construed to relive the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.").

²⁵ Letter to Chairman Kennard from Senators John Breaux, Slade Gorton, Spencer Abraham and Thomas Daschle, and Representatives Billy Tauzin and John Dingell (Dec. 22, 1998).

Applications for point-to-point 12 GHz paths fail to satisfy the mutual exclusivity predicate for competitive bidding. Rather, applications for such paths are tied to unique system requirements (*i.e.*, the location of the operator's headend), they are filed on a site-by-site basis, and they are subject to prior coordination. Mutually exclusive applications for point-to-point stations are, as a result, extremely rare and only occur in instances in which simultaneous applications are made through different frequency coordinators. Therefore, consistent with its obligations under Section 309(j)(6)(E), the Commission should avoid mutual exclusivity in this service by continuing to license 12 GHz paths on a coordinated, site-by-site basis.

IV. The 12 GHz Rules Should Be Flexible Enough To Accommodate A Wide Variety Of Services.

In the new age of communications, the hard lines between services, *e.g.*, video programming and telecommunications, are blurring. The integrated package of services provided by private cable operators such as OpTel now includes high-speed Internet access, telephony, data transmission, and video entertainment. In the future, it is almost certain that these categories will describe a single service. Indeed, as systems convert to digital technologies, even distinct services will look alike for transmission purposes. It makes no sense to speak of a video restriction on a particular microwave band when all services are reduced to a stream of 0's and 1's.

For these reasons, the Commission should, as it considers amendments to its microwave rules, strive to make them as flexible as possible. Accordingly, OpTel supports the suggestion that licensees in the 12 GHz band should be permitted to provide voice and data services in the band.

CONCLUSION

For the reasons set forth above, OpTel urges the Commission to amend its rules to allow all MVPDs to use the 12 GHz band on an equal footing with franchised cable operators.

Respectfully submitted,

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